

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT HERTULAR,

Petitioner

- v -

UNITED STATES OF AMERICA,

ORDER

S2 04 Cr. 009 (NRB)
10 Civ. 7380 (NRB)

Respondent.

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NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

WHEREAS on December 29, 2009, this Court re-imposed a sentence of 400 months imprisonment on petitioner Robert Hertular (Dkt. No. 52); and

WHEREAS on September 27, 2010, Hertular filed a petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (the "Petition"); and

WHEREAS in Ground Two of the Petition, Hertular asserts that his counsel failed to file a notice of appeal despite Hertular's (and the Court's) request that he do so (Petition at 18-19); and

WHEREAS no notice of appeal was filed on Hertular's behalf; and

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WHEREAS in a November 24, 2010 letter to this Court, the Government stated that it had spoken with Hertular's former counsel, who "advised that the omission [of the notice of appeal] was a result of an oversight on his part" (Letter from the Government to the Court, Nov. 24 2010 ("Gov. Ltr."), at 2); and

WHEREAS "counsel's failure to file a timely appeal in a criminal case, when requested by a defendant, constitutes ineffective assistance of counsel, entitling the defendant to relief" (United States v. Fuller, 332 F.3d 60, 64 (2d Cir. 2003) (abrogated on other grounds by United States v. Frias, 51 F.3d 229, 231 (2d Cir. 2008)); see also United States v. Medley, 300 Fed. Appx. 14, 15-16 (2d Cir. 2008)); and

WHEREAS when counsel has failed to follow a defendant's request to file a notice of appeal, the Second Circuit has stated that "the most appropriate disposition is to dismiss the appeal as untimely and remand to the District Court with instructions to vacate the judgment and enter a new judgment from which a timely appeal may be taken" (Fuller, 332 F.3d at 65); and

WHEREAS both petitioner and the Government request that this Court enter a new judgment imposing the same sentence as that imposed on December 29, 2009, and that the Court defer adjudication of petitioner's remaining claims while his appeal

is pending (see Gov. Ltr. at 2-3; Hertular's Reply to Government's Letter Response to 28 U.S.C. § 2255 Motion, Dec. 3 2010 ("Hertular Reply"), at 2)); and

WHEREAS Hertular requests that this Court appoint counsel both for the purposes of filing a notice of appeal and for representation throughout the appellate proceedings (Hertular Reply at 2), and

WHEREAS the Government requests that this Court appoint counsel for the limited purpose of filing a notice of appeal (Gov. Ltr. at 3); and

WHEREAS Hertular has, in a separate filing dated October 7, 2010, moved for a refund of a \$100 special assessment (plus interest) that he had paid as part of his sentence for his conviction on Count 3 of the Superseding Indictment, a conviction that was reversed by the Second Circuit (Defendant's Motion for Refund and Interest, Oct. 7, 2010); and

WHEREAS Hertular has also moved for "an additional award of \$200.00 for deprivational of use" (Id.); it is hereby

ORDERED that (1) this Court's December 29, 2009 judgment is vacated; (2) a new judgment imposing the same sentence as that imposed in the December 29, 2009 judgment is entered; (3) Hertular is appointed counsel for the limited purpose of filing a notice of appeal; and (4) the Clerk of this Court will

reimburse Hertular the \$100 special assessment he paid as part of his sentence for Count 3 of the Superseding Indictment.

Dated: New York, New York
January 13, 2011



Naomi Reice Buchwald
UNITED STATES DISTRICT JUDGE

A copy of the foregoing Order has been mailed on this date to the following:

Petitioner

Robert Hertular, Register # 52319-054
FCI Butner Medium II
Federal Correctional Institution
P.O. Box 1500
Butner, NC 27509

Respondent

Ivan Stephen Fisher
125 East 50th Street, Suite 301
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For the Government

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